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Supreme Court, U.S.
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No. 01-1435

IN THE
Supreme Court of the United States

CLACKAMAS GASTROENTEROLOGY ASSOCS., P.C.,

Petitioner,

v.

DEBORAH ANNE WELLS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW; AARP; ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND; NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM; NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES; AND PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, INC., AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST

The *amici* submit this brief with consent of the parties, in support of the Respondent's argument that the Ninth Circuit properly held that the four physician shareholders, who actively perform medical services on behalf of Clackamas Gastroenterology Associates, are employees for purposes of determining whether Clackamas is large enough to be deemed an employer under the Americans with Disabilities Act of 1990 ("ADA").[1] *See* 42 U.S.C. § 12111(5)(A).

The Lawyers' Committee for Civil Rights Under Law is a tax-exempt, nonprofit civil rights organization that was founded in 1963 by the leaders of the American bar, at the request of President John F. Kennedy, in order to help defend the civil rights of minorities and the poor. Toward that end, the Lawyers' Committee has been continually involved as *amicus curiae* in cases before this Court involving the proper scope and coverage afforded to federal civil rights laws prohibiting employment discrimination.

AARP is a nonprofit membership organization serving more than thirty-five million persons age 50 and older that is dedicated to addressing the needs and interests of older Americans. Approximately 45 percent of AARP members are employed, and many of these rely on the ADA to assure access to workplaces free from discrimination. AARP has filed numerous *amicus* briefs before this Court concerning interpretation of the ADA and other federal laws securing equal employment opportunity.

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[1] Counsel for *amici curaie* authored this brief in its entirety. No person or entity other than *amici curaie*, their staff, or their counsel made a monetary contribution to the preparation of submission of this brief. Letters of consent to this filling of this brief have been filed with the Clerk of the Court pursuant to Supreme Court rule 37.3.

The Asian American Legal Defense and Education Fund ("AALDEF"), founded in 1974, is a nonprofit tax exempt organization that advances and defends the civil rights of Asian American nationwide. AALDEF litigates cases involving employment discrimination and labor rights, immigrant rights, and voting rights. AALDEF has also represents and provided legal assistance to victims of anti-Asian violence as well as persons who assert claims of employment discrimination based on age or disability. AALDEF joins this *amici curaie* brief because of the important issues in this case that will define the scope and coverage of major civil rights statutes affecting Asian Americans.

The National Asian Pacific American Legal Consortium ("NAPALC") is a national nonprofit, nonpartisan organization whose mission is to advance the legal and civil rights of Asian Pacific Americans. Collectively, NAPALC and its Affiliates, the Asian Law Caucus and the Asian Pacific American Legal Center of Southern California, have over 50 years of experience in providing legal public policy, advocacy, and community education on discrimination issues. NAPALC and its Affiliates have a long-standing interest in employment discrimination and civil rights issues that have an impact on the Asian Pacific American community, and this interest has resulted in NAPALC's participation in a number of amicus briefs before the courts.

The National Association for the Advancement of Colored People ("NAACP"), established in 1909, is the nation's oldest civil rights organization. The NAACP has state and local affiliates throughout the nation, including the State of Maryland where it maintains its national headquarters. The fundamental mission of the NAACP

includes promoting equality of rights, eradicating caste and race prejudice among the citizens of the United States and securing for African Americans and other minorities increased opportunities for employment. The NAACP has appeared before courts throughout the nation in numerous important civil rights cases, including employment cases.

The National Partnership for Women & Families ("National Partnership") is a national advocacy organization that develops and promotes policies to help women achieve equal opportunity, quality health care, and economic security for themselves and their families. Since its founding in 1971, the National Partnership (formerly the Women's Legal Defense Fund) has worked to advance equal employment opportunities by monitoring agencies, EEO enforcement, challenging employment discrimination in the courts, and leading efforts to promote employment policies such as the Family and Medical Leave Act and the Pregnancy Discrimination Act.

The Puerto Rican Legal Defense and Education Fund, Inc. ("PRLDEF") is a national non-profit civil rights organization founded in 1972. PRLDEF is dedicated to protecting and furthering the civil rights of Puerto Ricans and other Latinos through litigation and policy advocacy. Since its inception, PRLDEF has participated both as direct counsel and as *amicus curiae* in numerous cases throughout the country concerning the proper interpretation of the civil rights laws, including federal employment discrimination statutes. The resolution of this case will have significant impact upon the extent to which PRLDEF and other civil rights organizations can protect the rights of their constituencies.

An employer is covered by Title I of the ADA when it has fifteen or more employees. 42 U.S.C. § 12111(5)(A).

The precise issue in this case is whether shareholders and directors of a professional corporation should be counted as employees for purposes of triggering coverage under the ADA when they actively perform professional services on behalf of the professional corporation. Although this case deals with an analysis of who can be sued under the ADA, the Court's interpretation of who constitutes an "employee" has much broader implications. Because other federal anti-discrimination statutes contain similar language defining the terms "employee" and "employer," this Court's determination will also affect cases brought under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e(b), and the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 630 (b).

Moreover, this case conceivably impacts the issue of who can sue, as suggested by the Government's brief. Government Brief ("Gov't. Br.") at 2. Further, because the damages provisions under several of these statutes are linked to the number of employees, the outcome of this case could affect what level of damages may be assessed against a discriminating employer. *See* 42 U.S.C. § 1981a(b)(3). Accordingly, this case is of exceptional importance to the interpretation and enforcement of various federal civil right laws, and to the rights of the clients and communities served by the *amici*.

SUMMARY OF ARGUMENT

The judgment of the Ninth Circuit Court of Appeals should be affirmed because it acknowledges Clackamas Gastroenterology Associates' ("Clackamas" or "Petitioner") decision to avail itself of the legal rights and liability shields associated with a professional corporation, and appropriately treats a professional corporation as a legal entity separate and distinct from a partnership in determining that the four

physician shareholders are employees of Clackamas. *See Wells v. Clackamas Gastroenterology Assocs., P.C.*, 271 F.3d 903 (9th Cir. 2001). Consistent with the approach articulated by the Second Circuit in *Hyland v. New Haven Radiology Assocs., P.C.*, 794 F.2d 793 (2d Cir. 1986), and as more precisely refined by the Tenth Circuit's decision in *Trainor v. Apollo Metal Specialties, Inc.*, No. 01-5077, 2002 U.S. App. LEXIS 25654 (10th Cir. December 13, 2002), the proper inquiry in determining whether a shareholder or director is an employee of a professional corporation is whether the shareholder or director performs traditional employee duties for the professional corporation.[2]

The Petitioner's "economic realities" test and the Government's multi-factored test both rest on the mistaken theory that professional corporations are legally indistinguishable from partnerships, and as such, the four doctors should be treated as partners, rather than employees of a corporation.[3] As the Ninth Circuit correctly recognizes, such theories ignore the established legal differences in both state law and federal law between corporations and partnerships. *See Clackamas*, 271 F.3d at 905. Moreover, both Clackamas and the Government improperly characterize the Ninth's Circuit's decision as one that merely exalts "form over substance."[4] Petitioner's Brief ("Pet. Br.")

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[2] This or a comparable analysis has been adopted by the Second, Ninth, and Tenth Circuits. For ease of reference, it is simply referred to as the "*Trainor* approach" throughout the brief.

[3] The Petitioner's "economic realities" test has been employed by courts in distinguishing between employees and independent contractors. The independent contractor analysis is not helpful, however, in resolving the issue presented here. *See infra* at section 2.

[4] Indeed, if any argument exalts form over substance, it is the Petitioner's, which seeks to have the Court ignore the substantive legal entity chosen by an employer, and instead focus on whether the shareholders/directors believe themselves to be more like "partners."

at 11. To the contrary, it is the legal form of the business that dictates the substantive rights and liabilities associated with that business. As observed by three circuits, choosing to incorporate under state law allows the corporate employer to seek the substantial tax advantages, significant insulation from personal liability, and employee benefits otherwise not available to other business entities. *See id.*; *Hyland,* 794 F.2d at 798; *Trainor, 2002 U.S. App. LEXIS 25654 at *26.*

Indeed, the "economic reality" in choosing to incorporate includes significant financial benefits -- a fact ignored in both the Petitioner's and Government's briefs.[5] Further, the *Trainor* approach is consistent with this Court's recent recognition that "incorporation's basic purpose is to create a distinct legal entity, with *legal rights, obligations, powers and privileges* different from those of the natural individuals who created it, who own it, or whom it employs." *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001) (emphasis added).

Here, because the four physician shareholders/directors performed professional medical services for the corporation through their employment agreements with the corporation, the Ninth Circuit properly treated them as employees of the corporation. Even where the employment relationship is not as obvious, the Tenth Circuit's *Trainor* decision, which employs a three-part test, demonstrates that the appropriate focus is whether a shareholder or director performs traditional employee duties for the corporation. The *Trainor* court relied on the

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5 While the Petitioner touts its theory as one that takes into account the "economic reality" of a corporation, it ignores the paramount economic reality—the legal structure under which the employer chooses to operate.

following factors; "1) whether the director has undertaken traditional employee duties; 2) whether the director was regularly employed by a separate entity, and 3) whether the director reported to someone higher in the hierarchy." *Trainor*, 2002 U.S. App. LEXIS 25654 at *27. Thus, even where, as here, the shareholders in question have employment contracts with the professional corporation in which they have invested, the substance of their employment activities and their relationship with the entity, not their title, governs the analysis as to whether they are an employee.

Finally, not only is the *Trainor* approach consistent with the general notion that anti-discrimination statutes are remedial in nature and must be given a liberal interpretation in order to effectuate their purposes, but it is also a bright line test that injects certainty into the administration of the various anti-discrimination statutes. *See Walters v. Metro. Educ. Enter. Inc.*, 519 U.S. 202, 211 (1997) (rejecting an approach for defining "employee" under Title VII that would "turn [the] coverage determination into an incredibly complex and expensive factual inquiry"). The Petitioner's and the Government's approach would create an untenable case by case, employer by employer, employee by employee analysis.

ARGUMENT

THE APPROPRIATE ANALYSIS IN DETERMINING WHETHER A SHAREHOLDER OR DIRECTOR IS AN EMPLOYEE OF A PROFESSIONAL CORPORATION IS WHETHER THEY PERFORM TRADITIONAL EMPLOYEE DUTIES FOR THE PROFESSIONAL CORPORATION

The language of the ADA does not resolve the issue of whether shareholders and directors of a professional corporation are appropriately regarded as employees.[6] *See Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 322 (1992) (noting that such "definition is completely circular and explains nothing"). Given the ambiguity of the statute, it is appropriate to look beyond the statute for construction of it. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). The *Trainor* approach provides an appropriate analytical framework for making this determination. As discussed below, the Petitioner's theory as well as the Government's theory, which allows an employer to escape coverage from the civil right laws by disavowing their chosen business structure, is not supported by federal law generally, Oregon's state law, or the legislative intent of the relevant statutes. Moreover, and perhaps most significant, adopting either the Petitioner's or the Government's approach would as a practical matter turn what should be a straightforward analysis into a case by case factually intensive determination.

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[6] The ADA defines employee as "an individual employed by an employer." 42 U.S.C. § 12111(4). An "employer," in turn, is defined as a "person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year." *Id.* at § 12111(5)(A).

1. A Professional Corporation Is A Legal Entity Separate And Distinct From A Partnership.

The Petitioner's and the Government's arguments are fatally flawed because they erroneously contend that the Ninth Circuit's decision, following the Second Circuit's approach in *Hyland*, merely exalts form over substance. *See* Pet. Br at 10-11; Gov't. Br. at 14. Rather than elevating form over substance, however, the Ninth Circuit correctly recognized that the legal form of an employer controls the substantive legal rights of the business entity chosen by the employer. *Clackamas*, 271 F.3d at 905; *Hyland*, 794 F.2d at 798. Recently, this Court recognized the substantive legal importance of the chosen business entity. In *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158 (2001), a case brought under the Racketeer Influenced and Corrupt Organization Act ("RICO"), this Court addressed the issue of whether the president and sole shareholder of a closely held corporation, was separate and distinct from the corporation itself. In finding that the corporation's sole owner and the corporation itself were indeed different legal entities, this Court held that "incorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs." *Cedric*, 533 U.S. at 204; *see also Burnet v. Clark*, 287 U.S. 410, 415 (1932).[7]

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[7] The Petitioner is effectively arguing that the professional corporation and the four physicians are the same legal entity, i.e. both the "employer," for purposes of the ADA. That analysis, however, ignores the "distinctness" principle of corporate law, recognized by this Court. *See Cedric*, 533 U.S. at 163. Because Clackamas and the four physician shareholders/directors are separate and distinct legal entities, they cannot both be the "employer" for purposes of ADA. Rather, the professional corporation itself is the employer and the physicians who are active shareholders are simply its employees.

The substantive rights associated with a professional corporation establish that a professional corporation is separate and distinct from a partnership.[8] For example, choosing to incorporate allows that corporation the ability to seek substantial tax advantages, and employee benefits otherwise not available to other forms of business entities. *See Clackamas*, 271 F.3d at 905; *Hyland*, 794 F.2d at 798; 1 W. Fletcher, *Cyclopedia of the Law of Private Corporations* § 20 (rev. ed. 1999). Perhaps more significant, the legal form chosen by the employer provides a corporate shield for all shareholders and directors under the corporate umbrella from all forms of personal liability except for their own malpractice. OR. REV. STAT. § 58.185(3); 1 Fletcher, § 20; UNIFORM PARTNERSHIP ACT, § 15 (1994). Further, even if malpractice is committed while performing services for the professional corporation, the professional shareholder's liability is capped –a limitation on liability not traditionally granted to partnerships. OR. REV. STAT. § 58.185(5)-(9). In other words, the four physicians in this case are not at risk in their personal capacities for the "non-malpractice" liabilities of the corporation and their risk for the malpractice claims of each other are limited, claims that could result in multi-million dollar malpractice lawsuits. *See id.* This corporate

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[8] The Government asserts that their multi-factored test should be accepted because it applies to partnership issues as well. Gov't. Br. at 12-13. The question of if, and when, partners are employees under the anti-discrimination laws is not before this Court. Instead, because Clackamas is a professional corporation, the issue is whether shareholders-directors, who perform services for the corporation, are employees of the corporation for purposes of ADA coverage. Indeed, because of the inherent legal and practical differences between partnerships and corporations (as discussed *infra*), it may be inappropriate to have the same test, as the Government suggests, apply to both. *See Clackamas*, 271 F.3d at 905. In any event, because the issue of when a partnership is a covered entity is not before the Court, the Court need not address that issue.

shield from liability alone is perhaps the most important "economic reality" associated with the professional corporation—a fact that both the Petitioner's and Government's briefs ignore in labeling the Ninth's Circuit decision as one that emphasizes "form over substance." Pet. Br. at 11; Gov't Br. at 15-16.

Additionally, the Petitioner's argument, advocating for the "economic realities" test, rests on the mistaken theory that professional corporations are legally indistinguishable from partnerships, and as such, the four doctors should be treated as partners, rather than employees of a corporation. As the Ninth, Second and Tenth Circuits correctly recognize, such a theory ignores the well established and significant legal differences under state law and federal tax laws between corporations and partnerships. *See Wells*, 271 F.3d at 905; *Hyland*, 794 F.2d at 798; *Trainor, 2002 U.S. App. LEXIS 25654 at *26*. Although a professional corporation may operate in a fashion similar to a partnership, that does not negate the fact that a professional corporation is organized under the color of state law as a corporation, nor does it negate the fact that special tax advantages are given to a corporation under federal tax code. *See id.*; *see also Gorman v. North Pittsburgh Oral Surgery Assocs., Ltd.*, 664 F. Supp. 212, 214 (W.D. Pa. 1987); *Johnson v. Cooper, Keans & Cargill, P.A.*, 884 F. Supp. 43, 45 (D. N.H. 1994) (declining employer's "invitation to ignore legal reality in deference to economic reality"). Indeed, the Petitioner, in discussing the historical origins of professional corporations, recognizes the employee benefits and tax breaks associated with incorporation. *See* Pet. Br. at 12-13.

The courts, in interpreting the federal revenue statute, have uniformly rejected an argument virtually identical to the Petitioner's—that shareholders of a professional corporation should be viewed as partners rather than

employees. *See Kurzner v. United States*, 413 F.2d 97, 107-108 (5th Cir. 1969); *O'Neil v. United States*, 410 F.2d 888, 899 (6th Cir. 1969); *United States v. Empey*, 406 F.2d 157, 168-170 (10th Cir. 1969); *see also Foglesong v. Comm'r of Internal Revenue*, 691 F.2d 848, 851 (7th Cir. 1982). In these cases, the federal government attempted, through regulations, to deny employee status to taxpayers who were shareholders, officers, and salaried employees of professional corporations. The courts of appeals, however, uniformly rejected the federal regulations that purportedly permitted the Internal Revenue Service to ignore the corporate structure for tax purposes.[9] *See id.*; *see, e.g., Epperson v. United States*, 490 F.2d 98, 99 (7th Cir. 1973). Because the courts of appeals have rejected the argument that professional corporations are like partnerships for federal tax purposes, that very same argument for purposes of avoiding liability under the anti-discrimination statutes should likewise be rejected.

Notwithstanding Petitioner's explicit recognition of the unique tax benefits and employee benefits associated with a professional corporation, Clackamas argues that certain characteristics of the Oregon Professional Corporation Statute require that it be treated more like a partnership for ADA purposes. For example, the Petitioner asserts that like a partnership, the shareholder must remain personally liable for any malpractice; that such shareholders must be licensed; and that special rules apply to professional corporations that practice medicine. *See* Pet. Br. at 14-15.

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[9] Indeed, shortly after these cases were decided, the Internal Revenue Service issued guidance that provides, "a professional service organization formed and operated under the Professional Service Corporation Act of a state listed in Rev. Rul. 70-101 is considered a corporation for Federal income tax purposes." Rev. Rul. 77-31, 1977-1 CB 409. Oregon is listed as one of the states to which this IRS's rule is applicable.

These state law provisions, however, exist for purpose of protecting the public from the unlicensed practice of medicine and to provide victims of malpractice with the appropriate recourse against physicians who have been negligent.[10] These provisions do not provide, nor do Petitioners point to, any rational basis for excluding physicians who provide medical services on behalf of the corporation from an assessment of the size of the professional medical corporation for purposes of the ADA, or any other anti-discrimination statute.

Here, the four physicians do not deny that they are by express written agreement "employees" of Clackamas, but instead argue that their employee activities and functions should be ignored because they believe they are like partners, and thus not employees, for purposes of ADA coverage. Justice Powell in his concurring opinion in *Hishon v. King & Spalding*, 467 U.S. 69 (1984), however, warned that "an employer may not evade the strictures of Title VII simply by labeling its employees as 'partners.'" *Id.* at 80 n.2. Here, that is precisely what Clackamas attempts to do — assert that the physicians are like "partners" to evade the obligations of the ADA. As the Ninth Circuit succinctly summarized, "there is no reason to permit the professional corporation to secure the 'best of both possible worlds' by allowing it both to assert its corporate status in order to reap the tax and civil liability advantages and to argue that it is like a partnership in order to avoid liability for unlawful employment discrimination." *Clackamas*, 271 F.3d at 905; *see also Hyland*, 794 F.2d at 798.

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[10] From a larger perspective, it is clear that these provisions are intended to insure that the malpractice liabilities remain personal to the professional. They were not intended to allow the organization to disavow its corporate structure merely because it may be in the Corporation's financial interest to do so.

2. The Proper Inquiry In Determining Whether The Clackamas Physician-Shareholders Are Employees Of A Professional Corporation Is Whether They Perform Traditional Employee Duties For The Professional Corporation.

The proper inquiry in determining whether a shareholder or director is an employee of a professional corporation is whether that shareholder or director performs traditional employee duties for that professional corporation. While the court in *Hyland* properly recognized that employees, such as the four physicians here, are employees of the corporation because of their status as "corporate employees" pursuant to employment agreements, *see Hyland*, 794 F.2d at 798, the *Trainor* decision refines the court's analysis in *Hyland* where such a result is not as obvious, *Trainor*, 2002 U.S. App. LEXIS 25654 at **27-28.

This Court has recognized that "there is nothing inherently inconsistent between the coexistence of proprietary and an employment relationship." *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 32 (1961). Honoring this recognition, the Tenth Circuit, in determining whether shareholders in a professional corporation are employees, found it useful to look to cases where the corporate officers or directors have also been deemed corporate employees. *See Trainor*, 2002 U.S. App. LEXIS 25654 at *27. The Tenth Circuit observed that the courts have embraced a three-part test which includes:

1) whether the director has undertaken traditional employee duties;
2) whether the director was regularly employed by a separate entity; and

3) whether the director reported to someone higher in the hierarchy.

Id. (citing EEOC v. Johnson Higgins, Inc., 91 F.3d 1529, 1539 (2d Cir 1996)). Because this inquiry captures the true essence of an employment relationship, it should be adopted by this Court in determining whether a shareholder of a professional corporation is an employee under the various anti-discrimination statutes. *See, e.g., Walters v. Metro. Educ. Enter., Inc.* 519 U.S. 202, 212 (recognizing that "the ultimate touchstone under § 2000e(b) is whether an employer has an employment relationship with 15 or more individuals").

Here, it is not necessary to apply the *Trainor* analysis because the four physicians have obvious employment relationships with Clackamas as evidenced by their employment agreements with Clackamas. JA 71; *Clackamas*, 271 F.3d at 906. Further, Oregon law treats the four physicians as employees of the corporation because they engage in employment services on behalf of the corporation. In particular, the Oregon law provides that a "'Licensed Oregon Shareholder' means a shareholder of a professionai corporation who holds a license to *render the specified professional services of the corporation.*" OR. REV. STAT. § 58.185(1)(a) (emphasis added). Further, Oregon law provides that "'[s]pecified professional services' means, for each professional corporation, the professional service or services to be *rendered through the professional corporation.*" OR. REV. STAT. § 58.185(1)(b) (emphasis added). Thus, Oregon law contemplates that the physicians in this case perform employee duties, e.g. the rendering of medical services, on behalf of Clackamas, and thus are employees of Clackamas.

Although it is not necessary to apply the *Trainor* three-part test in this case, the four physicians nevertheless would be deemed employees under such analysis. For example, and perhaps most telling in this case, the physicians received salaries and bonuses for performing their professional services as doctors for the corporation. JA at 35; *see Walters*, 519 U.S. at 211 (finding "in determining the existence of an employment relationship petitioners look first and primarily to whether the individual in question appears on the employer's payroll"). Further, there is no evidence that the physicians performed medical services for any other entity, other than Clackamas. Thus, because they contributed to Clackamas's production of medical services and were paid for those services, the four physicians would be deemed employees under the Tenth Circuit's approach.

The Tenth Circuit's analysis is consistent with cases addressing whether corporate officers, who have chief responsibility for running the business, are deemed employees for purposes of federal remedial statutes. *See EEOC v. First Catholic Slovak Ladies Ass'n*, 694 F.2d 1068, 1070 (6th Cir. 1982), *cert. denied*, 464 U.S. 819 (1983) (finding officers of non-profits corporation were employees protected by ADEA); *Stanojev v. Ebasco Serv.s, Inc.*, 643 F.2d 914, 916 (2d Cir. 1981) (finding vice-president of corporation covered by ADEA); *Cf. Graves v. Women's Prof. Rodeo Ass'n.*, 907 F.2d 71, 72-73 (8th Cir. 1990) (finding that members of corporation were not employees because they did not receive compensation for services and therefore did not have employment relationships with corporation); *Zimmerman v. N. Am. Signal Co.*, 704 F. 2d 347, 351-52 (7th Cir. 1983), *overruled on other grounds by Walters v. Metro. Educ. Enter. Inc.*, 519 U.S. 202 (1997) (finding corporate officers who were paid for their services and worked for corporation were deemed employees, while

officers who were unpaid and took no part in corporate daily affairs were not considered employees).

Finally, as recognized by the Government's brief, the common law agency test is not entirely applicable to the issue presented in this case. In particular, the common law test is appropriate in cases involving whether one is an employee or an independent contractor. *See Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992). The line-drawing exercise employed under the common law test is between those who are really part of a business (employees) and those who are running a separate business (independent contractor). Factors for that analysis, however, are not helpful in drawing lines between people who are part of the same enterprise. *See Hyland*, 794 F.2d at 798 (recognizing "it is one thing to apply an economic realities test to distinguish an employee from an independent contractor or partner, but it is quite another to apply the test in an attempt to identify as partner one associated with a corporate enterprise"); *Wheeler v. Hurdman*, 825 F.2d 257, 271-272 (10th Cir. 1987). Given the evidence that the four physicians are employees, there is simply no reason to undertake a complex, unwieldy, fact-intensive analysis as to whether they are "like" partners.

3. The *Trainor* Approach Is A Bright Line Test That Injects Certainty And Consistency Into The Administration Of Anti-Discrimination Statutes.

This Court has already rejected a definition of the term employee under Title VII that would "turn the coverage determination into an incredibly complex and expensive factual inquiry." *Walters*, 519 U.S. at 210; *see also Darden*, 503 U.S. at 326 (rejecting an approach for defining employee that was "infected with circularity and unable to furnish predictable results"). Both the Petitioner's "economic

realities test" and the Government's multi-factored test would do just that. While the Government recognizes that an approach like the one applied by the *Hyland* court would be easy to administer, it fails to acknowledge the potentially chaotic fact-intensive analysis associated with the administration of the Government's test as it applies to professional corporations.

One can easily imagine situations where shareholders would go in and out of coverage within a given month or year. For example, under the facts of this case, if Clackamas were to bring on one additional physician shareholder, presumably the amount of control held by the other four physician shareholders would diminish, and control would be spread among five physician shareholders, instead of the four physician shareholders. Under the Petitioner's test, a new factual analysis would be necessary to determine the "economic realities" of having just one additional physician shareholder. Next, imagine if Clackamas were to bring on an additional five shareholders. There, control would spread among ten physician shareholders, and a new factual determination would again have to be completed under the Petitioner's and the Government's approach to determine who is an employee. Presumably, at some point, some of the shareholders would have to be considered "employees" under the Government's test because they would not exert the type of control as the other more senior physician shareholders. This kind of fact intensive shareholder by shareholder analysis would "turn the coverage determination into an incredibly complex and expensive factual inquiry," *Walters*, 519 U.S. at 210, and is an approach that is "unable to furnish predictable results," *Darden*, 503 U.S. at 326. *See also Wheeler*, 825 F.2d at 271-272. Not only has this result been rejected by this Court, but it is also avoided under the *Trainor* approach.[11] Under *Trainor*, because each of these

physicians performs medical services for Clackamas, they would each be considered employees of Clackamas for purposes of the anti-discrimination laws.

Additionally, the Petitioner's argument that their approach is one that insures small businesses are not financially drained is simply wrong. Under their theory, a small business with sixteen individuals would be held liable under the economic realities test, but businesses with many more individuals would escape coverage. For example, imagine Company A, a professional corporation with fifteen employees and one sole director and shareholder. Under all the tests offered in this case, Company A would be subject to coverage under the anti-discrimination laws. Now, imagine Company B, a professional corporation with fourteen employees, and an additional ten directors and shareholders, who each perform services for the corporation, and who all own shares and control the company equally. Under the Petitioner's theory, Company A would be an employer under the ADA, while Company B would not, despite the fact that Company B is almost double its size. Under the *Trainor* approach, however, both companies would be covered under the ADA.

Moreover, to demonstrate the legal inconsistency and circularity of the Petitioner's argument, assume this is a race case triggering coverage under 42 U.S.C. § 1981, as well as Title VII. Under the Petitioner's theory, Clackamas would

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[11] As suggested by the Government, the definition of employee would be the same whether addressing coverage, or addressing whether one can sue under the relevant employment anti-discrimination law. In that situation, the chaotic situation posed by the Petitioner's and the Government's mulit-factored test is significantly magnified. Again, this kind of fact intensive analysis is not something the drafters of the anti-discrimination statutes could have envisioned in determining who can sue, when that person is indisputably part of a business, and the only question is whether one is an employer or employee.

argue there is no Title VII coverage because the four participating director/shareholders can not be treated as employees and therefore the 15 employee threshold triggering Title VII coverage is not met. Should the employee then argue that the four participating officers/shareholders are individually liable under 42 U.S.C. § 1981, it would be virtual malpractice for the shareholders not to invoke the corporate shield insulating them from suit. Thus, disavowing the corporate structure, Clackamas avoids coverage under Title VII, while the shareholder/partners simultaneously insulate themselves from personal liability by adopting the very corporate shield that was used to escape organizational liability under Title VII. This result is "infected with circularity," and is avoided under the *Trainor* approach.[12] *Darden*, 503 U.S. at 326. Because the *Trainor* approach offers certainty and consistency to both professional corporations and corporations and is legally compelling, it should be adopted by this Court.

4. Focusing On Whether The Clackamas Physician Shareholders Perform Traditional Employee Duties For Clackamas Is Consistent With The Legislative History Of Title VII, The Source Of The ADA Definition Of Employee And Employer.

This case turns on a construction of section 12111(5)(a), the provision which exempts small employers from ADA coverage. Because the definition of "employer"

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[12] Of course under § 1981, there may be a cause of action against Clackamas as a corporate entity because § 1981 does not have a minimum employee threshold for coverage. That result, however, further demonstrates the legal inconsistency of Petitioner's theory in that Clackamas is a corporate entity that would be subject to suit under § 1981, but would be able to disavow that corporate existence for Title VII purposes.

under the ADA is identical to that contained in Title VII, courts have applied cases construing the definition of "employer" in Title VII cases to ADA cases. *Compare* 42 U.S.C. § 12111(5)(A) with 42 U.S.C. § 2000e(b); *see Butler v. City of Prairie Vill.*, 172 F. 3d 736, 744 (10th Cir. 1999). Accordingly, it is appropriate to review the legislative history of Title VII for guidance in interpreting this provision of the ADA.

Section 701(b), which provides that employers are covered by Title VII only if they have fifteen employees for a specified time period, serves as a limitation on the reach of a remedial statute enacted to implement a national policy of the highest priority. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974). Thus, this exception for small businesses should be narrowly construed in order to achieve the remedial purpose. *See Robinson*, 519 U.S. at 341 (recognizing that "the plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole"); *Wheeler*, 825 F. 2d at 262 (stating "[i]n our review of the anti-discrimination statutes we must be mindful of their remedial purposes, and liberally interpret their provisions to that end); *Chavero v. Local 241, Div. of Amalgamated Transit Union*, 787 F.2d 1154, 1156 (7th Cir. 1986).

The remedial purposes of the anti-discrimination statutes are best served by a construction of the term "employer" that allows inclusion under the Act's protection of the greatest number of persons consistent with Congress's intent. When Title VII was passed in 1964, section 701(b) allowed for an exception to the compelling policy of non-discrimination by exempting small employers originally defined as employers with fewer than twenty-five employees. *See* Civil Rights Act of 1964, Pub. L. No. 352,

78 Stat. 241. Congress soon found this exception to be too broad, however, and in 1972, in order to increase coverage, reduced the statutory minimum number of employees from twenty five to fifteen. *See* 42 U.S.C. §2000e(b); *see also Armbruster v. Quinn*, 711 F.2d 1332, 1337 (6th Cir. 1983) (noting "[w]e construe the Amendment's broad reach as an indication of Congress' desire to have the entire Act broadly construed").

Two significant statements in the House and Senate Reports capture Congress's desire to broaden the reach of Title VII so that smaller employers were also held accountable for unlawful acts of discrimination. In the House Report, Congress recognized that "discrimination in employment is contrary to the national policy and is equally invidious whether practiced by small or large employers." *See* H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 20, *reprinted in Subcomm. on Labor-Senate Comm. on Labor and Public Welfare Legislative History of the Equal Employment Opportunity Act of 1972 ("1972 Legislative History")* at 80. In particular, the House Report recognized that "because of the existing limitation . . . a large segment of the Nation's work force is excluded from an effective Federal remedy to redress employment discrimination." *Id.* Likewise, the Senate Report stated that "discrimination should be attacked wherever it exists [] recognize[ing] that small establishments have frequently been the most flagrant violators of equal employment opportunity." *See* S. Rep. No. 92-415, 92d Congress, 1st Sess. 8, *reprinted in 1972 Legislative History* at 417.

Moreover, this Court interpreted has already the term "employee" in Title VII to include former employees because exclusion of those individuals "would be destructive" of "a primary purpose of the anti-retaliation provision: [m]aintaining unfettered access to statutory

remedial mechanisms." *Robinson*, 519 U.S. at 346. For similar reasons, the *Trainor* approach allows for access to the fullest extent possible to victims of discrimination. Accordingly, the remedial purposes of the various anti-discrimination statutes are best served by an interpretation of the terms "employee" and "employer" that would extend protection of the anti-discrimination statutes to the greatest number of persons consistent with Congress's intent.

CONCLUSION

For the foregoing reasons, the *amici* respectfully submit that the judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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